IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ADMIRALTY SUIT NO. 23 OF 2004

WITH

ARBITRATION PETITION NO. 72 OF 2005

AND

ARBITRATION PETITION NO. 143 OF 2005

ADMIRALTY SUIT NO. 23 OF 2004.

Zenith Ltd., ... Plaintiffs.

vs.

m.v. PONTOPOROS & Ors. ... Defendants.

WITH

ARBITRATION PETITION NO. 72 OF 2005

IN

ADMIRALTY SUIT NO. 23 OF 2004.

Oldendorff Carries GmbH + Co.K.G. .. Petitioners.

v/s.

Zenith Limited. .. Respondents.

WITH

ARBITRATION PETITION NO. 143 OF 2005

IN

ADMIRALTY SUIT NO. 23 OF 2004

Patvolk a division of Forbes
Gokak Limited .. Petitioners.

v/s

Zenith Limited .. Respondents.

Mr. Ruben Fernandes for plaintiffs and Respondents in Arbitration Petition Nos. 72/05 and 143/05.

Mr. V.K. Rambhadran for Defendants and Petitioners in Arbitration Petition Nos. 72/05 and 143/05.

CORAM : S.U.KAMDAR, J.

DATE : 6th July 2005.

ORAL JUDGMENT :

. These two arbitration petitions are instituted under the provisions of Section 45 of the Arbitration and Conciliation Act, 1996 inter alia seeking that the Admiralty Suit being Suit No. 23 of 2004 be referred to the arbitration in view of the arbitration agreement between the parties. Some of the material facts in the present case are as under :-

2. The respondents have instituted a suit being Admiralty Suit No. 23 of 2004 against the vessel

being defendant no. 1, Patvolk, a division of Forbes Gokak Limited being defendant no. 2 and Oldendorff Carriers, a company incorporated under foreign laws and carrying on their business through their agents the 2nd defendant in India being defendant no.3.

3. By the said suit the respondents are seeking that the said vessel which is the first defendant be ordered to be arrested and sold as and when she enters into the territorial waters of India and sale proceeds thereof should be applied towards the satisfaction of the plaintiffs claim in the suit. By the said suit the respondents are also seeking an order and decree in the sum of US Dollars 1,30,017.16, US Dollars 33,859.58 and Rs. 1,50,00,000.00 in accordance with the particulars of claim set out therein with interest at the rate of 12% per annum. The particulars of claim inter alia indicates that the amount of US Dollars 130,017.16 is claimed as and by way of loss suffered by the plaintiffs in respect of the said goods. A further sum of US Dollars 33,859.58 is claimed towards the expenses incurred by the plaintiffs in mitigating the losses and an amount of Rs. 1,50,00,000.00 is claimed towards loss of business opportunity and other expenses. The said suit has been filed by the plaintiffs in the background of the facts which are briefly enumerated as under:-

4. The plaintiffs are carrying on business of manufacturers and exporters of welded galvanised steel pipes and are having their factory in Raigad District at Khopoli. The 1st defendant vessel is flying the flat of Cyprus and was owned and controlled by the 3rd defendant at the material time. The 2nd defendant is sued in the present case as a shipping agent of the 3rd defendant. Paragraph 3 of the plaint reads as under :-

> "3. The second Defendants are a company incorporated under the provisions of the Companies act, 1956 and carry on business at the address as shown in the cause title hereinabove as inter alia shipping agents. The second Defendants were, at the material time and still are the agents of the third Defendants, on whose behalf they inter alia receive and disburse monies and enter into freight earning contracts. The second Defendants were also acting as agents of the first Defendant vessel, which called at port Mumbai on 9th July 2003."

The 3rd defendant is sued in its capacity as a principal and a owner of a ship and/or ship charters. It is the case of the plaintiff that pursuant to the orders placed upon the plaintiffs by

Shamrock Building Materials Inc. for supply of 1008.804 MT of goods, the plaintiffs shipped the goods from port Mumbai to port Tampa, Florida, USA. The buyers had opened a letter of credit in respect of the said goods. The said letter of credit was established in accordance with the uniform customs and practice. It is the case of the plaintiffs that the defendant nos. 2 and 3 were obliged to issue a clean (unclosed) bill of lading pertaining to the said goods through their bankers for the purpose of realising monies. It is the case of the plaintiffs that sometime in May 2003, the plaintiffs contacted the 2nd and 3rd defendants for the purpose of booking space on the 1st defendant vessel for the aforesaid voyage. Accordingly a booking note was entered into between the plaintiffs and the 3rd defendant under the terms of which the 3rd defendants agreed to carry the goods shipped by the plaintiffs from Port of Mumbai to port Tampa upon payment of necessary freight by the plaintiffs. It is the further case of the plaintiffs that the booking note which was issued was not clean and thus the plaintiffs did not receive the price of the goods to a certain extent and thus the plaintiffs have suffered loss and damage in respect of the suit transaction.

5. The defendant nos. 2 and 3 both have filed the present two arbitration petitions being

Arbitration Petition No. 72 of 2005 and Arbitration Petition No. 143 of 2005. In these arbitration petitions, the petitioners inter alia contended that there is an arbitration agreement forming part of the said booking note and in view of the said arbitration agreement the matter be referred to arbitration under section 45 of the Arbitration and Conciliation Act, 1996. The relevant arbitration clause reads as under :-

> "2. This Booking note shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Booking Note shall be referred to arbitration in London in accordance with the Arbitration Act of 1996 or any subsequent amendments thereto. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) current at the time that arbitration proceedings are commenced. Unless parties agree on a single arbitrator, each party hereto to appoint an arbitrator and a third by the two so chosen. Their decision or that of any two of them shall be final. The arbitrators shall be commercial shipping men in cases where the claim does not exceed USD 50000- the claim shall be dealt with in accordance with the LMAA small

claims procedure current at the time of commencement of proceedings.

Notwithstanding the aforementioned, should be a dispute arise out of this contract wherein it is determined that US Law applies, then such a dispute to be arbitrated at New York with one arbitrator being appointed by each of the parties hereto and a third by the two so chosen. Their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement shall be made a rule of the court. The arbitrators shall be commercial shipping men. Such arbitration is to be conducted in accordance with the rules of the Society of Maritime Arbitrators Inc. For disputes where the total amount claimed by either party does not exceed USD 50000-. the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc."

6. The respondent who is the plaintiff in the suit has resisted the present arbitration petitions. It has been inter alia contended that the matter should not be referred to the arbitration though there is a arbitration clause between the parties.

The learned counsel for the respondent has firstly contended that the agent is not a party to the arbitration agreement as the booking note is not signed or issued by him and thus there is no arbitration agreement between the agent who is defendant no. 2 and the plaintiff and, therefore, the matter cannot be referred to the arbitration by relying upon the aforesaid clause of the terms and conditions of the booking note. Alternatively it has been contended that in any event, the claim of the plaintiff against the defendant no. 2 is independent on the basis that the defendant no. 2 has committed fraud in collusion and connivance with defendant no. 3 and which has resulted in the plaintiff suffering loss in the present case and, therefore, the said part of the claim does not form part of the arbitration agreement and thus cannot be referred to the arbitration. The third and the last argument advanced by the respondent/plaintiff is that the arbitration agreement is vague and incapable of being implemented in as much as it is not clear whether the arbitration will be in accordance with the English Law or the laws of the United States of America and, therefore, there is no valid arbitration agreement under which the suit can be referred to arbitration under section 45 of the Arbitration and Conciliation Act, 1996. In support of the aforesaid contention the learned counsel for the respondent has firstly relied upon a judgement

of the Apex Court in the case of Sukanya Holdings Pvt. Ltd., v. Jayesh H. Pandya and another reported in AIR 2003 SC 2252. Particularly he has relied upon paragraphs 16 and 17 of the said judgment which read as under :-

> "16. The next question which requires consideration is -- even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.
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> "17. Secondly, such bifurcation of suit in

> two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

7. The learned counsel has thereafter contended that the liability of the agent is independent to the liability of the principal. Firstly, the said contention is merely required to be stated for the same to be rejected. If the agent is sued in his capacity as an agent then obviously the liability of the principal and the agent is synonymous. Apart therefrom even in a suit the claim is made by the respondent both against the defendant no. 2 and 3 as joint and several. Prayer clause (c) of the said suit reads as under :-

> c) For an Order and Decree in favour of the Plaintiffs and against the Defendants jointly and/or severally in the sum of US Dollars 130,017.16, US Dollars 33,859.58 and Rs. 1,50,00,000.00 as per particulars of

claim shown in Exhibit 'A' hereto together with interest on each of the aforesaid sums at the rate of 12% per annum from the date of the institution of the suit till payment/realisation.

Apart therefrom even if the averments in the plaint are perused, particularly paragraphs 16 and 18 thereof, it is clear that the cause of action which has resulted in filing of the present suit is same as against both the defendant nos. 2 and 3 and merely defendant no. 2 is sued in the capacity of the agent whereas the defendant no. 3 is sued in the capacity of the principal. However, the learned counsel for the respondent has relied upon an unreported judgment of the learned Single Judge of this Court in Notice of Motion 842 of 2000 in Suit No. 164 of 1999 dated 25.1.2001 (J.B.F. Industries Ltd., vs. Express Line and others) and has also relied upon the judgment of the learned Single Judge of the Calcutta High court in the case of Nepal Food Corporation v. U.P.T. Import & Export Ltd (PART) and another, reported in AIR 1988 CAL. 283 and has contended that the liability of the agent is independent than that of the liability of the principal. He has relied upon the following portion of the aforesaid judgment.

"Held that there was negligence and breach

of obligation on the part of the agent, and he had also committed the tort of conversion in respect of the disputed bills of lading and/or the goods covered thereby inter alia by withholding the issuance of the bills of lading and as a result the plaintiff suffered damages which sere equal to the value of the goods. There was a statutory duty cast upon the defendant 2, as agent, to issue bills of lading, on demand and this, the defendant 2 failed to carry out. The agent failed to carry out their statutory obligation which was also the contractual obligation. Clause 1 of the bills of lading provides that the Hague rules, as enacted in the Country of shipment shall apply. Therefore the said rules apply both contractually as well as statutorily."

8. On the other hand, the learned counsel for the respondent has relied upon the judgement of the Gujarat High Court in the case of Societe Commercial De Coreales and Financiers vs. State Trading Corpn. of India, New Delhi and another, reported in AIR 1998 Guj. 94 and has contended that the agent is nothing but an agent of the principal and thus, the agent is claiming through the principal and, therefore, the action on the part of the agent and that of the principal is synonymous and the

arbitration agreement under the booking note would apply to both the agent and the principal because the cause of action is one and the claim is not different but arising under the said contract of booking note. The learned counsel for the plaintiff has relied upon the following paragraphs of the said judgement.

> "8. As far as the first contention raised by the learned counsel for the appellant is concerned, the trial Court appears to have proceeded on the footing as if the assertion made by defendant No. 1 that the oil was of non-USA origin was denied by the plaintiff. The question of leading any evidence by defendant No. 1 in support of the aforesaid assertion would have arisen only if the plaintiff had denied such an assertion. Since the plaintiff had not controverted the specific assertion made by the defendant No. 1, the trial Court should have proceeded on the footing that the cargo in question was non USA origin especially in view of the fact that the cargo was admittedly loaded at a port in Brazil and not at any port in the USA. The first ground given by the trial Court for rejecting the application, therefore, cannot be upheld.

9. The second ground which appealed to the trial Court also does not appear to be well founded. It is true that in a suit based on one cause of action, if there are two defendants in the suit, the Court cannot require the plaintiff to split up a part of the claim for referring the matter to arbitration in respect of one defendant and proceed with the other part of the suit against the other defendant. However, in the instant case, the question of splitting would not arise because admittedly the Charter Party agreement for shipping of the cargo was executed on 13-12-1977 between defendant No. 1 and defendant No.2 for carrying the cargo of Soyabean oil from Brazil to India. It is thus clear that defendant No. 2 was acting as an agent of defendant No. 1 and, therefore, defendant NO. 2 had accepted the purchase price of the cargo in question on behalf of defendant No. 1. Under these circumstances, a bare reading of Section 3 of the Foreign Awards Act clearly shows that not only the party tot he arbitration agreement but also a party claiming through a party to the arbitration agreement would be entitled to invoke provisions of Section 3 of the

Foreign awards Act, Section 3 of the Foreign Awards Act reads as under :

"3. Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article 11 of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the arbitration agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfies that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings".

(Emphasis supplied).

In view of the above, it must be held that defendant No. 2 was a party claiming through or under defendant No. 1 in respect of the subject matter of the suit and also in respect of the subject matter of the dispute in question which is sought to be referred to arbitration and, therefore, defendant No. 2 was also entitled to apply to the Court to stay the suit proceedings. The second ground which appealed to the trial Court must also, therefore, fail."

9. The learned counsel for the petitioners has also relied upon the judgment of Chancery Division in the case of ROUSSEL-UCLAF v. G.D. SEARLE & CO. LTD AND G.D. SEARLE & CO., reported in [1978] Vol. 1para. 225, particularly on the following paragraphs:

> " There is no decisive authority on this point which covers the present case, although the words seem to have been included in the various Arbitration Acts for some time. On pp. 143 and 144 of Russel on Arbitration, 18th ed., the expression "claiming through or under" is shown to include the instances of an assignee of a contract containing the arbitration claim, of the personal representatives of a deceased party, and of the trustee of a bankrupt. It apparently has been held to exclude the mortgagee of the share in a partnership of a partner in respect of whom the partnership has been determined, because it was said the mortgagee’s right to an account was independent of the deed. It was, however, held to include the insurers of a motor vehicle who stood in the shoes of their insured in respect of a policy containing an arbitration clause in relation

to which an action was also begun. The action was stayed.

The line between those within and those outside the words has got to be drawn somewhere. Mr. Aldous of course argued the phrase was very narrow in scope and for practical purpose confined to such people as assignees and personal representatives. Mr. Laddie argued for a wider scope, and wide enough at least to cover a wholly owned subsidiary selling on behalf of and by the direct authority and under the control of its parent. Mr. Aldous argued that an entirely independent third party could not claim the benefit of the phrase merely because, for example, as a customer, he had acquired goods from Searle (US) and was thus using or reselling on the market. Searle (UK) is not, however, an independent party, though it may be a separate legal entity, in this sense.

" Searle (UK) is for all practical purposes Searle (US) in the United Kingdom and is in fact the selling agent of the latter. In the case of Bonnin v. Neame, [1910] 1 Ch. 732, a case of a partner and his mortgagee referred to in Russell, it is clear that the

arbitration clause was limited to partners and their executors or administrators and did not in fact include the words "claiming through or under". It is not therefore surprising that the point was taken that the case was not really within the corresponding 1889 Arbitration Act then in force, which used the same words "claiming through or under", and that a stay was refused.

The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary

> can establish that it is within the purview of the arbitration clause, on the basis that it is "claiming through or under" the parent to do what it is in fact doing whether ultimately held to be wrongful or not."

10. I have considered the aforesaid contentions. In my opinion, the liability of the agent and that of the principal is arising from the same cause of action and the agent is not sued in its independent capacity but has been sued as the 3rd respondent principal. Once there is an arbitration agreement with the principal then the agent who is claiming through the principal, and/or is liable through the principal would not have any independent cause of action and thus, the said cause of action which has culminated in the suit can be resolved through the arbitration under Section 45 of the Arbitration and Conciliation Act, 1996. The judgement relied upon by the learned counsel for the petitioner in the case of Sukanya Holdings Pvt. Ltd., (supra) has no application on the facts of the present case because in the case of Sukanya Holdings Pvt. Ltd, (supra) some of the defendants were sued in their independent capacity and they were not parties to the arbitration agreement. They were not sued in the suit in the capacity through a person who is a party to the arbitration agreement. In view thereof, in my opinion, the contention raised by the

learned counsel for the respondent has no merits and are required to be rejected.

11. This leads me to the next contention of the learned counsel for the petitioner that the arbitration agreement is vague as it is incapable of determination wether the arbitration has to be conducted in accordance with English Law or the laws of the United States of America or as contended by the petitioner by the Indian Laws. Firstly, in my opinion, that issue has to be essentially resolved by the arbitrator who will be appointed in terms of the arbitration agreement. However, since the parties have insisted upon contesting the said issue at this juncture I am dealing with the same. The learned counsel for the respondent has contended that under the provisions of Section 4 of the Carriage of Goods by Sea Act, 1925 every bill of lading is a document of title and the same is the evidence of title and any express statement mentioned therein shall have effect subject to the provisions of the Rules as applied by this Act. He has further contended that in view of the aforesaid bill of lading having been issued by the 3rd respondent who is the shipper and who is governed by the laws of United States of America then in that view of the matter if the matter is referred to the arbitration, the laws of United State of America would be made applicable and that would prejudice

the rights of the plaintiffs in the present suit. Apart from the fact that it would result in tremendous inconvenience in establishing the case of the plaintiff before the arbitrator in the United States of America. He has further contended that in any event, the arbitration clause is in two parts. The first part deals with the matter to be decided by the arbitrator at London and to be governed by English Laws. Whereas the second part deals with the matter to be resolved at New York and to be governed by the Laws of United States of America. On the other hand, the learned counsel for the petitioners has relied upon Section 2 of the Carriage of Goods by Sea Act, 1925 and has drawn my attention that whenever the goods are shipped from any part in India to any other part whether in or outside India then in that event the provisions of of Carriage of Goods by Sea Act, 1925 shall have effect and in fact the said arbitration wold have to be therefore governed by the Indian Laws.

12. I have considered the rival submissions of the parties. In my opinion, the provisions of Section 2 of the Carriage of Goods by Sea Act, 1925 is clear inter alia indicating that the goods are carried from Indian Port port to any other port outside India then in that event the provisions of Indian Law will be made applicable. However, for the purpose of procedure before the arbitrator under

clause 2 of the said arbitration agreement the English Law has been made applicable. Thus, for substantial law the law of India will apply and for the purpose of procedural law, the English Law will apply by virtue of the first part clause of the arbitration agreement. In so far as the second part of the arbitration agreement is concerned, the same has no application in the present case because that applies only when it is agreed between the parties that the dispute will be determined according to the US Law then only the second part of the said arbitration agreement is applicable. In my opinion, there is no such case has been pleaded nor any such case has been established that the second part of the arbitration agreement applies in the present case. In view thereof, I pass the following order :

> Both the petitions are allowed. The Admiralty Suit No. 23 of 2004 is referred for arbitration under Section 45 of the Arbitration and Conciliation Act, 1996 in terms of the first part of the arbitration clause no. 2 of the arbitration agreement between the parties and that the Arbitrator will be appointed in accordance with the London Maritime Arbitrators Association Rules and Regulations between the parties. Both the petitions as well as Admiralty Suit No. 23 of 2004 are accordingly disposed of.

However, there shall be no order as to costs.